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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of AMY AARONSON and ANDREJ OSLICA.	
AMY AARONSON, Appellant, v. ANDREJ OSLICA, Respondent.	A128516 (Alameda County Super. Ct. No. RF07349500)

I. INTRODUCTION

Amy Aaronson (Aaronson) filed a petition to nullify her two-year marriage with Andrej Oslica (Oslica). After a trial, the court denied Aaronson's petition and ordered Aaronson to pay a total of $15,000 of Oslica's attorney fees and costs. On appeal, Aaronson contends that the attorney fee order must be reversed because the trial court ignored the fact that she was unemployed and considered other improper factors when making its order. We reject these contentions and affirm the order.

II. STATEMENT OF FACTS

The parties were married on June 21, 2005. On October 3, 2007, Aaronson filed a petition for nullity of marriage on the ground of fraud. The alleged fraud pertained to Oslica's immigration status when the marriage commenced. In a response to the petition filed in January 2008, Oslica requested dissolution of the marriage.

Trial commenced on March 26, 2009, before the Honorable Glenn P. Oleon, and took almost six months to complete. Aaronson presented her case in four half-day sessions, the last of which was held on September 24, 2009. After Aaronson completed her case, the trial court denied her petition and granted Oslica's motion for judgment. (Code Civ. Proc., § 631.8.)

On October 15, 2009, Oslica filed a motion for attorney fees and costs and for bifurcation of the proceedings for entry of "status only" judgment of dissolution. Oslica requested an award of attorney fees incurred to defend the nullity petition on the grounds of need (Fam. Code, § 2030) and that he successfully defended against a claim of fraud (Fam. Code, § 2255). Oslica also requested that an attorney fee sanction be imposed against both Aaronson and her counsel for meritless litigation, unwarranted delay and failure to comply with court orders. (Fam. Code, § 271; Code Civ. Proc., §§ 128.5 & 128.7.)

In a supporting declaration, Oslica stated that he incurred substantial fees defending against Aaronson's "unsupported claim that our marriage was based on fraud." Oslica pointed out that the trial took several days and that he had made multiple attempts and offers to settle the matter amicably and civilly but, instead, Aaronson "and her counsel sought to tarnish my reputation, making wild accusations with no evidence about me and my family, implying all manner of things that were simply false." Oslica also stated that it appeared that Aaronson and her attorney "seemed to have purposefully delayed the proceedings, knowing full well that any delay could lead to my possible deportation."

On October 27, 2009, Aaronson filed a responsive declaration to Oslica's motion in which she refused to consent to the request for a bifurcated judgment or for the payment of Oslica's attorney fees, and also made her own request for attorney fees in the amount of $1,500 to compensate her for having to respond to Oslica's motion.

In her declaration, Aaronson maintained that she did not file her nullity petition for an improper purpose, but rather that she obtained advice from an immigration attorney which led to her realization that Oslica had married her only because he wanted to avoid

deportation. Aaronson also stated that she "did not delay these proceedings to drag thing[s] out," but that she was under a doctor's care for health issues she did not wish to reveal. Finally, Aaronson offered this explanation for her refusal to consent to a status only judgment of dissolution: "Due to me not being able to collect unemployment benefits after next month, I really need support and for Andrej Oslica to add me to his health insurance. I am asking the court not to grant a divorce yet until I begin working which will hopefully be sometime in early Spring of 2010 after completion of a required course as one of the conditions of my employment. After I begin working, I will then be able to afford monthly insurance premiums."

A judgment of dissolution as to status only was filed on December 7, 2009.[1] The following week, on December 14, the court held a hearing on Oslica's motion for attorney fees and sanctions. At the conclusion of a fairly detailed dialogue with both counsel, the court took the matter under submission so that it could "review the record a little more thoroughly about, and perhaps . . . do a little more research before I issue a ruling." For the record, the court identified the two issues which merited further attention. First, the court was concerned about Aaronson's financial situation and her ability to pay an award of attorney fees. The second issue was whether Aaronson's legal position had been truly meritless. In this regard, the court confirmed a sentiment first expressed at the conclusion of trial that this was "not all that close of a case," but it also recognized that there is a "difference between that and it being meritless."

On March 15, 2010, the court filed an "Order On Attorney Fees, Costs and Sanctions" (the attorney fee order) pursuant to which it made three distinct orders. First, the court ordered Aaronson to pay $5,000 of Oslica's attorney fees and costs pursuant to Family Code section 2255 (section 2255), which authorizes an award of attorney fees and costs (in accordance with Fam. Code, § 2030 et seq.) in a proceeding to nullify a

[1] In his Respondent's Brief, Oslica contends that Aaronson "continued to frustrate" his ability to obtain a dissolution judgment, but then "simply dropped her opposition." Aaronson does not address this specific issue in her Appellant's Opening Brief and has elected not to file a Reply.

marriage when "the party applying for attorney's fees and costs is found to be innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage for which a judgment of nullity is sought."

Second, the court ordered Aaronson to pay an additional $10,000 of Oslica's attorney fees pursuant to Family Code section 271 (section 271) which authorizes an award of attorney fees as a sanction for frustrating "the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys."

Third, the court ordered Aaronson's trial counsel to pay a $500 sanction pursuant to section 177.5 of the Code of Civil Procedure for violating a lawful court order without good cause or substantial justification.

At the conclusion of its order, the court acknowledged that Aaronson's conduct during this litigation could also possibly violate other statutes, but concluded that the sanctions it intended to impose would be a sufficient penalty and deterrent against similar "future malfeasance." The court also determined that it "could not in good faith order Petitioner to pay more than $15,000 total fees and costs to [Oslica] in light of her tenuous financial condition."

At a hearing on May 3, 2010, the court denied Aaronson's motion for reconsideration of the attorney fee order and the sanction award.[2] On May 14, 2010, Aaronson filed her notice of appeal.

III. DISCUSSION

" '[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal.' [Citation.] Thus, we affirm the

[2] The sanction imposed against Aaronson's trial counsel is not at issue on this appeal. However, we note for the record that the trial court made a correction to its order to provide that Aaronson's trial counsel was to pay her sanction to the court rather than to Oslica.

court's order unless ' "no judge could reasonably make the order made. [Citations.]" ' [Citations.]" (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630.)

The same standard applies to the award of sanctions under section 271, a matter which is "committed to the discretion of the trial court, and will be reversed on appeal only on a showing of abuse of that discretion, that is 'only if, considering all of the evidence viewed more favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.' [Citations.]" (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1524 (*Davenport*).)

Aaronson contends the trial court abused its discretion by failing to properly consider the respective financial circumstances of the parties as it was required to do under both section 2255 and section 271.

"[W]hile the court has considerable latitude in fashioning or denying a pendente lite fee award its decision must reflect an exercise of discretion and a consideration of the appropriate factors. [Citations.]" (*In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1219.) In other words, the record must establish that the court considered all factors that are set forth in the statute(s) authorizing the fee award. (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 242.)

Preliminarily, we note that Aaronson does not dispute that section 2255 authorizes a fee award to Oslica under the circumstances presented. She claims, however, that the court failed to consider the statutory factors set forth in Family Code section 2030 et seq., which are incorporated by reference into section 2255. Those provisions codify the procedure for a need-based fee award in a family law proceeding. (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.) When considering such an award, the court is required to consider the respective financial needs and circumstances of the parties involved. (*Ibid.*; Fam. Code, §§ 2030 & 2032.)

Similarly, section 271, which authorizes an award of attorney fees and costs as a sanction for conduct which frustrates the policy of the law to promote settlements and reduce the cost of unnecessary litigation, requires the court to consider evidence regarding the parties' "incomes, assets, and liabilities," and that statute does not authorize

a sanction that "imposes an unreasonable financial burden on the party against whom the sanction is imposed." (§ 271, subd. (a).)

The record before us clearly reflects that the trial court gave due consideration to the respective financial circumstances of the parties in this case. Indeed, at the hearing on the attorney fee motion, the court took the matter under submission so that it could fully consider that specific factor. Thereafter, the court filed a thoughtful order which contains a detailed summary of the financial circumstances relating to both parties.

In its order, the court found, among other things, that Oslica had been charged approximately $46,000 in attorney fees of which he had only been able to pay $5,000. The court concluded that the amount of fees that Oslica incurred was high, but "not unreasonable in light of the hotly contested and aggressive manner in which [Aaronson] pursued her nullity petition." Aaronson, on the other hand, had incurred only $19,000 in fees and had already paid $11,000 of that debt. Oslica had a yearly income of $48,000, no assets and was not reasonably able to pay all of his attorney fees. At the time of the hearing on the attorney fee motion, Aaronson was unemployed but had expressed her intention to look for work and, in the meantime, she was receiving support from her parents. Aaronson's few assets included a "modest used car and a retirement account with a balance of about $56,000." Taking all of these factors into account, and expressly acknowledging that Aaronson's ability to contribute to Oslica's fees and costs was "modest indeed," the court exercised its discretion under section 2255 and 2030 by ordering Aaronson to pay $5,000 directly to Oslica's attorney.

In making the additional finding that Aaronson engaged in conduct meriting a $10,000 sanction pursuant to section 271, the trial court expressly acknowledged its obligation to consider Aaronson's financial circumstances and incorporated by reference the findings it made in support of the section 2255 order. The court also acknowledged that Aaronson had no income to pay a sanction award but also noted that she had a retirement savings account she could "tap into." Furthermore, the court placed heavy weight on the fact that Aaronson had engaged in very questionable litigation tactics. Although the court "stop[ped] short" of finding that Aaronson acted in bad faith, it

concluded that her nullity petition was "flimsy indeed." Oslica had made several offers to stipulate to a judgment of dissolution which Aaronson rejected and the court could not discern any possible justification for Aaronson's "dogged pursuit of the nullity petition other than (a) a quixotic effort to assuage her broken heart, and (b) a desire to punish [Oslica] perhaps by means as drastic as deportation from the United States, because the marriage didn't work out as the parties hoped." Ultimately, the court concluded that $10,000 was a reasonable sanction, given the thousands of dollars of unnecessary fees and costs that Aaronson caused Oslica to incur.

On appeal, Aaronson ignores the trial court's detailed order and the very serious findings pertaining to her conduct in this litigation and instead makes the rote claim that the court ignored the fact that she was unemployed. Clearly, the court did no such thing. Indeed, the record before us strongly suggests that the court would have ordered Aaronson to pay a significantly higher fee and sanction if not for the fact that she was unemployed.[3] To the extent Aaronson is suggesting that, as a matter of law, a fee award and sanction cannot be made against an unemployed individual, she cites no authority and provides no sound justification for such an obviously dangerous rule.

Aaronson separately contends that the trial court erred by relying on her retirement account as a potential source for paying the fee award and attorney fee sanction. The only authority Aaronson cites for this proposition is Code of Civil Procedure section 704.115 (section 704.115) which states, in part: "(b) All amounts held, controlled, or in

[3] At the hearing where Aaronson's motion for reconsideration of the attorney fee order was denied, the court made this telling statement: "This was, I'll be blunt. This was a very weak case. It took me no time at all to make my decision because it was so clear cut by the time the evidence was in, and in light of that, I think, frankly, Ms. Aaronson could have been ordered to pay a whole lot more. Mr. Oslica was required to incur a very substantial amount of fees here, and I don't think he should have had to, and if Ms. Aaronson, frankly, if she were presently working or had been presently working at the time that I made the order, I would have ordered her to pay more. So I don't expect [her] to think that she got off easy or she's lucky for the result, but that's how strong I felt about the award in this case. It would have been more if I felt it would have been reasonable to make it more."

process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt."

" 'The purpose of the section 704.115 exemption for the corpus of private retirement plans is to safeguard a stream of income for retirees at the expense of bankruptcy creditors.' [Citation.]" (*Segovia v. Schoenmann* (N.D. Cal. 2009) 404 B.R. 896, 909.) To invoke this exemption, the debtor must not only show that his or her plan constitutes a private retirement plan within the meaning of the statute, but also that it is "designed and used" for the debtor's retirement purposes. (*Ibid*.) "If both questions are answered in the affirmative, then all assets in the plan are exempt. [Citation.]" (*Ibid*.)

We find no evidence in the record to support Aaronson's assumption that her retirement account would qualify for a section 704.115 exemption and, in any event, this is not a bankruptcy case. Furthermore, the court did not order Aaronson to invade her retirement account, but only observed that she had that asset and the funds in that account were available to her if she elected to use them. Aaronson provides no authority or sound reasoning to support her claim that section 704.115 applies in this context. Indeed, as Aaronson herself contends, the attorney fee and sanction statutes at issue in this case require the court to consider the financial resources of the parties.

Finally, Aaronson contends that the trial court violated Evidence Code section 1152 (section 1152) and committed reversible error by considering evidence pertaining to settlement discussions between the parties. Section 1152 states, in part: "(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

By its clear language, section 1152 precludes using the fact or content of settlement discussions to prove "liability" for a claimed loss or damage. It does not preclude considering such evidence for purposes of evaluating whether to impose a

sanction in a family law case for frustrating the "policy of the law to promote settlement of litigation" and to reduce litigation costs by "encouraging cooperation between the parties and attorneys." (§ 271.)

Aaronson contends that this court's decision in *Davenport, supra,* 194 Cal.App.4th 1507, precludes a trial court from using evidence of the parties' conduct during settlement negotiations to support a section 271 sanction order. In that case, this court affirmed a family court order awarding a husband sanctions and attorney fees pursuant to section 271 in a martial dissolution proceeding. The *Davenport* opinion summarized rather extreme misconduct by the former wife and her attorney, discussed the trial court's thorough and well reasoned decision and summarized the law supporting that decision. As a whole, the *Davenport* opinion fully supports our analysis and conclusions in the present case.

In her appellate brief, Aaronson isolates a single finding by the *Davenport* trial court: that the wife's attorney violated Evidence Code section 1119, which precludes disclosure of settlement discussions during mediation. (*Davenport, supra,* 194 Cal.App.4th at p. 1521.) From this isolated fact, Aaronson draws the following conclusion: "If disclosure of the contents of settlement discussions are protected in the context of *Davenport*, it warrants protection here of settlement discussion between counsel." This conclusion is both illogical and unreasonable. During litigation on the merits, the *Davenport* attorney violated the express language of a statute by using information disclosed during settlement discussions at a mediation. Here, by contrast, after the judgment was entered, the trial court considered evidence pertaining to unreasonable conduct during settlement negotiations in accordance with section 271.

Aaronson contends that permitting a family law court to consider evidence of settlement discussions when ruling on a section 271 motion would violate public policy and discourage settlement discussions "because parties may fear being faced with sanctions if they refused to accept a settlement offer, as occurred in this case." We firmly reject the implication that Aaronson was sanctioned solely because her attorney rejected a settlement offer. Though far from comprehensive, the appellate record is chalk-full of

examples of both improper and wasteful litigation tactics. Furthermore, not only did the court find that the nullity petition lacked merit, it also correctly observed that the petition offered Aaronson "little or no substantive benefit beyond that which she obtained from the ultimate dissolution judgment," and thus her resistance to that judgment was unreasonable and imprudent.

The record before us establishes that both the nullity petition that gave rise to this litigation and numerous other motions filed by Aaronson thereafter lacked substantive merit and that she and her counsel employed improper tactics throughout this case. As the *Davenport* court observed, section 271 "says what it says." (*Davenport, supra,* 194 Cal.App.4th at p. 1536.) " '[T]he court may base an award . . . on the extent to which the conduct of each . . . attorney furthers or frustrates the policy of the law to promote settlement . . . and . . . to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.' " (*Ibid*.) Substantial evidence before us establishes that conduct by Aaronson and her counsel frustrated both of these important policies.

IV. DISPOSITION

The order is affirmed. Oslica is awarded costs on appeal.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.